

Phan (Migration) [2019] AATA 2921 (21 May 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Anna Phan

VISA APPLICANTS: Mr Van Dinh Nguyen
Mr Tuan Anh Nguyen
Mr Huu Phuoc Nguyen

CASE NUMBER: 1718307

DIBP REFERENCE(S): OSF2016/038400

MEMBER: Hugh Sanderson

DATE: 21 May 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.
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- Statement made on 21 May 2019 at 9:27am

1. CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) — did not display high degree of knowledge in some areas of each other's lives – companionship and emotional support – genuine and continuing long-term relationship – mutual commitment to shared life to exclusion of all others – intention to live together permanently – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65
Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 24 June 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
3. The first named visa applicant (the visa applicant) applied for the visa on 1 September 2016 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 Partner (Provisional). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the visa applicant was the spouse, as defined in s.5F of the Act, of the review applicant.

Background

5. The review applicant was born in Vietnam and is currently 50 years old. She first entered Australia in 1995 holding a Prospective Marriage visa. She was subsequently granted a Spouse visa and given the right to reside permanently in Australia. She is an Australian citizen. She divorced her husband who sponsored her for a visa and entered a de facto relationship and has a child from that relationship, Michelle, who is currently 13 years old. She ended her relationship with her former de facto partner in 2006.
6. The visa applicant is a citizen of Vietnam and is currently 53 years old. He was previously married and has two children of that marriage, the second named visa applicants, who are currently 20 and 19 years old. He divorced his former wife in September 2008 after having lived separately from her since 2007.
7. The review applicant's movement records show that she has travelled to Vietnam as follows:
 - From 19 November 2010 to 6 February 2011;
 - From 27 December 2011 to 13 January 2012;
 - From 15 December 2013 to 23 January 2014;
 - From 3 January 2015 to 3 February 2015;
 - From 7 July 2016 to 4 August 2016;
 - From 10 July 2017 to 26 July 2017; and
 - From 29 December 2017 to 20 January 2018.
8. The parties claim they first met each other on 4 December 2010 when the review applicant was visiting her brother's house in Vietnam who was a friend of the visa applicant. They spent time together while the review applicant was in Vietnam and continued to

communicate with each other via telephone calls after she returned to Australia. In August 2011 the visa applicant proposed marriage to the review applicant and she accepted.

9. When the review applicant returned to Vietnam in December 2011 an engagement ceremony was held. Some members of the visa applicant's family did not agree with the visa applicant marrying a woman from southern Vietnam and they refused to attend the engagement ceremony.
10. The visa applicant applied for a Prospective Marriage visa on 25 February 2014. This application was refused by the Department as the delegate was not satisfied the parties genuinely intended to live together as spouses. A review to the Tribunal (differently constituted) affirmed the Department's decision to refuse the application.
11. On 22 July 2016 the parties registered their marriage in Vietnam. A traditional wedding ceremony took place in Vietnam on 23 July 2016. This included the family members of the visa applicant who had previously opposed marriage attending but were now supporting the parties' marriage.
12. Various documents were provided in support of the application. This included evidence that the review applicant had obtained temporary residence with the review applicant when visiting Vietnam, statements from friends and family attesting to the genuineness of the relationship, statements by the parties, and photos of the parties together. The visa applicant was interviewed by an officer from the Department on 25 April 2017.
13. The delegate who considered the application noted the following issues:
 - There was little evidence of any financial aspects of the relationship;
 - Although there was evidence the review applicant had obtained temporary household registration in the home of the visa applicant, there was no information which would indicate the parties had established a household together;
 - The visa applicant provided inconsistent information when interviewed compared to information provided by witnesses in support of the application as to social aspects of the relationship;
 - Although the statements from the visa applicant's family members indicated the parties had met each other and members of their family, there was little information that the parties represent themselves as being married;
 - The claimed relationship started after the parties had only known each other for a very short period of time;
 - Although the parties now claim they had known each other for many years, the visa applicant was not able to demonstrate a knowledge of aspects in the review applicant's life including details of her study, what she was doing before she was studying and information about the review applicant's friends in Australia; and
 - There were inconsistencies in the answers the visa applicant gave to the Department when interviewed in 2014 in respect of his Prospective Marriage visa and the interview in 2017 about the current application.
14. Taking these matters into account, the delegate was not satisfied the parties were in a genuine and continuing relationship. The delegate was not satisfied the visa applicant was the spouse, as defined in s.5F of the Act, of the review applicant and therefore did not meet

the criteria in cl.309.211. The application was refused. As the second named visa applicants were not members of the family unit of a person who met the primary criteria, their applications were also refused.

Information to the Tribunal

15. The parties provided further information to the Tribunal including the following:
 - Telephone records;
 - Correspondence sent by the parties to each other;
 - Photos of the parties together with various family members; and
 - Statements by the parties.
16. The review applicant appeared before the Tribunal on 20 May 2019 to give evidence and present arguments. The Tribunal also received oral evidence from a friend of the visa applicant who lives in Australia and the visa applicant. The review applicant was represented in relation to the review by her registered agent who attended the hearing.
17. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in the present case is whether the visa applicant is the spouse, as defined in s.5F of the Act, of the review applicant.

Whether the parties are in a spouse or de facto relationship

19. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
20. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

21. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married in Vietnam and that marriage was registered on 22 July 2016. There is nothing to indicate a marriage between the parties is

not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

22. There is little information as to the financial aspects of the relationship. The parties do not jointly own any property or have any joint liabilities. There is no information that the parties have been pooling their financial resources or have shared day-to-day household expenses. This is not surprising. The parties live in separate countries and the sponsor has little or no assets and only limited income. She is not in a position to provide any financial support to the visa applicant. What little money she has sent to Vietnam has been by way of gifts and are not an indication of pooling any financial resources. The visa applicant is self-employed and has to support himself and his two children. The review applicant was able to provide details of the assets owned by the visa applicant indicating they had discussed their respective financial circumstances.
23. When the review applicant has travelled to Vietnam she has stayed with the visa applicant in his home. Their day-to-day expenses when living together has been shared by the parties. Apart from this, there is little further information which would indicate the financial aspects of the relationship indicate the parties are living in a genuine and continuing relationship. In light of the circumstances of the parties, however, the Tribunal places little weight on this aspect when considering whether the parties' relationship is genuine.

Household

24. When the review applicant and her daughter have travelled to Vietnam they have stayed with the visa applicant and his children in his home in Ho Chi Minh City. Photos have been provided of the parties and their children together in the visa applicant's home and travelling together in Vietnam.
25. The parties provided details of each other's children including their schooling and academic pursuits. The Tribunal accepts that the parties, when their respective families are together, have the joint responsibility for the care and support of their children.
26. Overall, there is only limited information that the parties have ever established a household together. The only time they have been together is when the review applicant and her daughter have travelled to Vietnam and stayed with the visa applicant in his home. As the parties live in separate countries and have only limited financial resources, it is again not surprising that there is only limited information of any shared household. The Tribunal places little weight on this aspect when considering whether the parties have a mutual commitment to a shared life as husband and wife in considering whether the relationship is genuine and continuing.

Social aspects

27. The parties provided photos of various social activities they have participated in together in Vietnam. This includes taking part in a wedding ceremony. The parties have travelled together with their families through Vietnam. They have attended other family celebrations together as a couple, such as the wedding of the visa applicant's nephew. The attendance of this wedding and other social occasions indicates the parties represent themselves as being married to each other.

28. Statements have been provided by a number of friends and family of the parties attesting to the fact that they believed that the relationship is genuine. A friend of the visa applicant who lives in Australia gave evidence in support of the application. The review applicant was able to provide information about this friend, including details of his work and other aspects which indicated they were both aware of each other circumstances.
29. Overall, the Tribunal finds that the parties represents themselves as being married to each other in this relationship is recognised by their friends and family as genuine. They participate in various social activities with their families and by themselves. The social aspects of the relationship support a finding that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing.

Commitment to each other

30. The parties first met each other December 2010. This was arranged by the review applicant's brother who lives in Vietnam and is a friend of the visa applicant. He believed that the parties would make a good couple in light of the fact that the visa applicant had separated from his wife in 2007 and was now divorced and the review applicant had ended her previous de facto relationship on 2006. The circumstances of the parties with their care of their respective children were also similar.
31. After meeting each other and continuing to communicate with each other after the review applicant returned to Australia they decided to become engaged. An engagement ceremony was conducted in Vietnam on 12 January 2012. They have now been in a relationship for over six years. Once the Prospective Marriage visa application was refused, the parties were married on 22 July 2016. They have now been married for almost 3 years.
32. The parties provided consistent information about many aspects of their lives together and also as to their activities of themselves and their children in their respective countries. This included details of where the children were attending school and what they were studying, their work, details of when the review applicant's parents died and aspects of their financial circumstances. The parties were aware of each other's religious beliefs. In respect of this, the parties indicated that they respect each other's differing religious beliefs but they did not disclose any clear knowledge of how they each practice their religion. It would appear they have not discussed in detail with each other their respective religious activities or beliefs and simply accept they have different religious beliefs as the review applicant's parents had.
33. There were other aspects of their lives where the parties provided inconsistent information or were not aware of details of each other's lives. The visa applicant was not aware of the contact arrangements the review applicant's child has with her father and the review applicant was unaware of any arrangements the visa applicant's children have to contact their mother. The visa applicant was unaware of any difficulty the review applicant had in her relationship with her father. Although he was aware of where she was currently working, he believed that she had been working there for significantly longer that she had.
34. The Tribunal finds that the parties have not discussed some aspects of their life together which would be expected if they were in a genuine relationship. The Tribunal accepts, however, that this in part is due to the nature of their personalities. The review applicant, as a Catholic, has faced some criticism as she is divorced and was then living in a relationship with a man who she was not married to and had a child with him. This caused some personal shame which she has not wished to share with anyone, including the visa applicant. The Tribunal accepts that both parties are respectful of each other's personal religious beliefs and show this respect by not asking each other questions about it.

35. In other aspects of their relationship, the parties have shown a detailed knowledge of each other's lives and their activities. They are aware of details of each other's siblings and have been involved in various social events together. They provided consistent information as to their plans for their future. They have considered various financial aspects of their relationship.
36. Overall, the Tribunal finds the parties do provide each other the degree of companionship and emotional support which would be expected in a genuine and continuing relationship. Their plans for their future indicate they consider their relationship as long-term and wish to support each other in the future and live together.

Overall assessment

37. The Tribunal has considered all the circumstances of the claimed relationship both individually and cumulatively. As indicated above, although there were certain areas in each other's lives where the parties did not display a high degree of knowledge and understanding, overall the parties displayed the degree of companionship and emotional support would be expected in a genuine relationship. The review applicant and her daughter have travelled to Vietnam and spent extensive time with the visa applicant and his children.
38. The Tribunal finds the weight of evidence supports a finding that the parties have a mutual commitment to a shared life to the exclusion of all others as husband and wife, that the relationship is genuine and continuing and that the parties intend to live together permanently.
39. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore the visa applicant meets cl.309.211 and cl.309.221.
40. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.
41. As the primary applicant meets these criteria for the grant of the visa, the application is of the second named visa applicant's should now be reconsidered in full.

DECISION

42. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).